APPENDIX A-1

ORDER OF THE NEW YORK STATE
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second day of July A.D. 1982

Present: Hon. Lawrence A. Cooke,
Chief Judge, Presiding

3 Mo. No. 671

In the Matter of Marilyn L. Cowger, Appellant,
vs.
Charles Mongin & Ors, constituting the Zoning Board of Appeals of the Town of Niskayuna, New York, Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

Filed with Sch. Co. Clk. 7/23/82

/s/ P.L.R.

APPENDIX A-2, p. 1

ORDER APPEALED FROM

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 15th day of March, 1982.

PRESENT:
HON. FRANKLIN MAHONEY,
Presiding Justice
HON. MICHAEL E. SWEENEY
HON. JOHN T. CASEY
HON. ANN T. MIKOLL
HON. HOWARD A. LEVINE,
Associate Justices.

(Same Title)

Marilyn L. Cowger, Petitioner-Appellant, having appealed from a Judgment of the Supreme Court held in and for the County of Schenectady, entered on the 9th day of December,

1980, in the Office of the Clerk of the County of Schenectady, and said appeal having been presented during the above-stated term of this Court, and having been argued by John P. MacArthur, Esq., attorney for the Appellant, and Paul L. Ryan, Esq., attorney for the Respondents, and, after due deliberation, the Court having rendered a decision on the 22nd day of April, 1982, it is hereby

ORDERED, that the Judgment so appealed from be and hereby is affirmed, without costs.

ENTER:

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: April 28, 1982.

A TRUE COPY

/s/ John J. O'Brien
Clerk

SUPREME COURT, APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

April 22, 1982 41732

(Same Title)

Appeal from a judgment of the Supreme Court at Special Term (Cerrito, J.), entered December 9, 1980 in Schenectady County, which, inter alia, dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to annul a determination of the Zoning Board of Appeals of the Town of Niskayuna.

On June 8, 1979, petitioner obtained a building permit allowing her to construct two fences on her property in the Town of Niskayuna. Construction of the fences commenced in October, 1979. A neighbor of petitioner registered a complaint concerning the fences with the Town Board of the

Town of Niskayuna on November 20, 1979 and was told to attend a meeting of the Town of Niskayuna Planning Board and Zoning Commission on December 3, 1979. He attended that meeting and was told that he could not obtain the relief he sought before the planning board. Consequently, on December 6, 1979, the neighbor filed an appeal with the zoning board of appeals challenging the issuance of the building permit to petitioner. The board reserved decision on the appeal but ordered petitioner to remove the barbed wire on one of the fences within 30 days. In February, 1980, the Town of Niskayuna commenced an action against petitioner seeking the removal of the barbed wire. At a meeting of the board held on February 7, 1980, it was decided that the fences were accessory structures; that petitioner already had two accessory structures on her property; and that the fences

were constructed in violation of the town zoning ordinance which permits only two accessory structures per residential lot. The building permit was therefore ruled invalid and petitioner was ordered to remove the fences. This article 78 proceeding was then commenced seeking annulment of the board's determination. Special Term dismissed the complaint of the Town of Niskayuna as moot, dismissed petitioner's application, and ordered that the fences be removed by petitioner. This appeal ensued.

Petitioner maintains that the appeal by her neighbor to the zoning board of appeals was untimely. The relevant rule provides that an appeal must be made within thirty (30) days of the action of the administrative

official appealed from" (General Governing Rules, Zoning Board of Appeals of the Town of Niskayuna, §5.1.2). In situations such as the present one, however, where a person demands revocation of a permit issued to another, an appeal should not be required until his demand for revocation has been rejected with some formality and finality (Matter of Pansa v. Damiano, 14 N.Y.2d 356). Applying a liberal construction to the applicable rule in the instant case as the court did in Pansa and considering the circumstances surrounding the appeal, we conclude that the appeal was timely.

Section 5.7.1.1 of article V of the Town of Niskayuna Zoning Ordinance permits only two accessory structures

per residential lot. Petitioner does not dispute that at the time she obtained the building permit she had two accessory structures on her property. She does argue, however, that the board incorrectly determined that the fences were accessory structures. In this regard it is to be noted that the construction given an ordinance by a zoning board should be upheld if not irrational or unreasonable (Matter of Delles v. Cooper, 55 A.D.2d 244, 245-246). An "accessory structure - minor" is defined as "detached accessory buildings or other structures one hundred and twenty (120) square feet or less in area" (Town of Niskayuna Zoning Ordinance, art. II). Fences are by definition included as structures (id.). Section 5.7.1.2-B of article V

of the ordinance provides that "No minor accessory structure other than fences, shall be located within five (5) feet of the side or rear lot lines" (emphasis added). Upon consideration of these pertinent provisions of the zoning ordinance, we are of the opinion that the board's determination that fences are accessory structures is rational and reasonable and, therefore, should not be disturbed.

Petitioner also contends that the town should be estopped from invalidating the building permit she obtained due to her reliance on the permit in constructing the fences. We disagree. An invalid permit vests no rights in contravention of a zoning ordinance in the person obtaining that permit (see Matter of B & G Constr. Corp. v. Board

of Appeals of Vil. of Amityville, 309 N.Y. 730; Rollins v. Armstrong, 226 App. Div. 752, affd. 251 N.Y. 349). Accordingly, the town was not estopped from enforcing its zoning ordinance under the present circumstances (see Anderson, N.Y. Zoning Law and Practice [2d ed.], § 6.09, pp. 178-181). We have considered petitioner's remaining arguments and find them unpersuasive. The judgment must be affirmed.

Judgment affirmed, without costs.

MAHONEY, P.J., SWEENEY, CASEY, MIKOLL and LEVINE JJ., concur.

APPENDIX A-3, p. 1

ORDER AND OPINION OF THE COURT BELOW

STATE OF NEW YORK
SUPREME COURT
COUNTY OF SCHENECTADY

(Same Title) ORDER

PRESENT: HONORABLE D. VINCENT CERRITO,
Justice of the Supreme Court
State of New York

Upon reading and filing the Petition of Marilyn L. Cowger, verified the 12th day of March, 1980, demanding the reversal and annulment of a decision of the Zoning Board of Appeals of the Town of Niskayuna, New York; the Answer to said Petition by Paul L. Ryan, on behalf of Respondents, verified April 28, 1980, praying for dismissal of said Petition and for an Order compelling Petitioner to remove the fences at 867 Hereford Way in the Town of Niskayuna, in compliance with the decision of said Zoning Board of

Appeals; together with all the affidavits, minutes and documents submitted in connection therewith, and

ALSO, upon reading and filing a Summons and Complaint by the Town of Niskayuna against Marilyn L. Cowger, dated February 7, 1980, together with an Order to Show Cause based thereon, dated February 9, 1980, demanding removal of barbed wire from an eight-foot fence at 867 Hereford Way; an Answer in opposition thereto, dated February 22, 1980; and a Reply dated February 28, 1980; and

After hearing John P. MacArthur, Esq. attorney for Petitioner, in support of said Petition, and Paul L. Ryan, Esq., attorney for the Respondents, in opposition thereto, and due deliberation having been had on all

matters before the Court in this proceeding, I find that the determination of the Zoning Board of Appeals of the Town of Niskayuna, New York, has a rational basis,

NOW, on motion of Paul L. Ryan, attorney for the Respondents, it is

ORDERED, that the Petition herein be, and it hereby is, dismissed, and it is further

ORDERED, that the Complaint and Order to Show Cause referred to above also are dismissed, having been rendered moot by my decision, and it is further

ORDERED, that Petitioner is hereby directed to remove, within 30 days, the two fences on her premises at 867 Hereford Way, in compliance with the decision and order of the Zoning Board

of Appeals of the Town of Niskayuna, New York, duly made in session on February 7, 1980, that said fences be removed.

Dated: Dec. 8, 1980

Enter:

/s/ D. Vincent Cerrito
HONORABLE D. VINCENT CERRITO
Justice of the Supreme Court
State of New York

STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

(Same Title)

APPEARANCES: John P. MacArthur
for petitioner,

Paul L. Ryan, Town
attorney for respondents.

CERRITO, J. On June 8, 1979, the Town of Niskayuna issued a building permit to petitioner allowing her to construct two fences on her property. One fence to be about four feet high and situated on the property line. The other set back two or three feet from the property line and eight feet high with a two foot overhang of barbed wire atop it. Construction of these fences began in the early part of October 1979 and was substantially completed by the end of that month.

Because of the erection of

an industrial type security fence in a residential area, petitioner's neighbors registered complaints with the Town Planning Board on November 19, 1979 and the Town Board on November 20, 1979. On December 6, 1979, an appeal of the building inspector's issuance of the permit was filed with the Zoning Board of Appeals (ZBA).

That body first considered this matter at its December 28, 1979 meeting. There was a considerable discussion which resulted in a direction from the ZBA that the barbed wire be removed from the eight foot fence within 30 days. The petitioner did not comply with this direction, so the Town has moved before this court for an order directing her to remove the barbed wire and enjoining her from maintaining

any barbed wire on the fence.

The ZBA next considered this appeal at its January 17, 1980 meeting. Again there was an extended discussion with the ZBA voting to postpone action on the appeal in order to obtain advice from the New York State Department of State as to whether a fence is an "accessory structure" under the terms of the Town's Zoning ordinance.

This was the critical issue before the ZBA since the zoning ordinance only permits two accessory structures per residential lot (Niskayuna, N.Y., Zoning Ordinance, Art. V, section 5.7.1.1). At the time petitioner applied for the permit in June, 1979, her lot already contained two such structures. Consequently, if fences were considered "accessory structures",

the permit should not have been issued for with the addition of the two fences petitioner's lot would contain four accessory structures.

At its February 7, 1980 meeting the ZBA decided that fences were "accessory structures" and ordered petitioner to remove her two fences as they were in violation of the zoning ordinance. This Article 78 proceeding, instituted by the petitioner, ensued.

The first issue which petitioner raises is the timeliness of the appeal to the ZBA. Under its General Rules, an appeal must be made to the ZBA within 30 days of the administrative action complained of (General Governing Rules, Zoning Board of Appeals of the Town of Niskayuna, section 5.1.2).

When persons other than the permittee are appealing the grant of a permit, the 30 day period does not begin to run from the date of the issuance of the permit but from the time these persons had notice of the building inspector's actions provided there has been no element of undue delay or laches (see, Mtr. of Pansa v Damiano, 14 NY2d 356; Mtr. of Cave v Zoning Bd. of Appeals of Vil. of Fredonia, 49 AD2d 228; Highway Displays v Zoning Bd. of Appeals of Town of Wappinger, 32 AD2d 668).

Petitioner's neighbor, the appellant before the ZBA, should have had notice of the building inspector's action in the latter part of October, 1979 since that was when the fences were substantially completed. Thus,

if the ZBA's General Rules are applied literally, this appeal is time barred as it was formally commenced 30 days after the appellant had notice. However, due to the informal character of board procedure, courts do not rigidly apply the general rules of zoning boards (see, Anderson, N.Y. Zoning Law and Practice, section 20.06, 2nd ed.).

Under the circumstances of this case, I find the appeal to the ZBA to have been timely. The appellant registered his complaints with the various town boards well within the 30 day period and promptly filed an appeal with the ZBA after receiving the advice to do so at the Town Board's November 20th meeting. Furthermore, petitioner has not shown any actual

prejudice accruing to her from appellant's inconsequential delay.

When reviewing the decision of zoning officials, the court's role is limited. It may not substitute its judgment for that of the zoning board and must sustain the board's determination as long as it is not arbitrary or contrary to law (see, Mtr. of Campus v Delany, 62 AD2d 990; Mtr. of Davison v. Segur, 24 AD2d 797).

Whether the decision here has a rational basis depends upon whether under the terms of the zoning ordinance a fence can be considered an "accessory structure".

The ordinance defines an "accessory structure - minor" as "detached accessory buildings or other structures one hundred and twenty (120)

square feet or less in area" (Niskayuna, N.Y. Zoning Ordinance, Art. II). The term "other structures" is not defined so in order to ascertain its meaning reference must be made to the ordinance's definition of "structure". That reads: "A combination of materials forming a construction that is safe and stable and includes among other things, platforms, radio and television towers, trestles, bridges, piers, sheds, storage bins, walls, fences and display signs." (emphasis supplied)(Niskayuna, N.Y., Zoning Ordinance, Art. II). Since fences are included within the definition of "structures", it is logical to assume that they are likewise included within the term "other structures".

This assumption is supported

by the language of section 5.7.1.2.B of the ordinance which reads: "no minor accessory structure other than fences, shall be located within five (5) feet of the side or rear lot lines." (emphasis supplied). The inclusion of the phrase "other than fences" clearly demonstrates that the drafters of this ordinance considered fences to be accessory structures. If they considered them not to be, then the inclusion of such phrase would have to be considered to be mere surplusage. That would be an improper consideration because it cannot be presumed that the inclusion of the phrase was without any purpose or view (McKinney's Statutes, section 231).

Accordingly, as an interpretation of the zoning ordinance supports the

ZBA's position that fences are accessory structures, I find that its determination herein has a rational basis. Therefore, I will dismiss the petition. The respondents' order to show cause is also dismissed since it is rendered moot by this decision.

Respondents to submit order.

Dated: November 25, 1980

/s/ D. Vincent Cerrito
D. Vincent Cerrito
J.S.C.

APPENDIX B

THE CONSTITUTION OF THE UNITED STATES

Amendment 14

Section 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

NEW YORK STATE
CIVIL PRACTICE LAW AND RULES

ARTICLE 78

Proceeding Against Body or Officer

§7801. Nature of Proceeding

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer

or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

§7804. Procedure

(a) Special Proceeding . . .

(c) Time for service of notice of petition and answer. Unless the court grants an order to show cause to be served in lieu of a notice of petition at a time and in a manner specified therein, a notice of petition,

together with the petition and affidavits specified in the notice, shall be served on any adverse party at least twenty days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served at least five days before such time. A reply, together with supporting affidavits, if any, shall be served at least one day before such time . . .

(g) Hearing and determination; transfer to appellate division. Where an issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall make an order directing that the proceeding be

transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced; the court may, however, itself pass on objections in point of law. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding.

(h) Trial. If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith. Where the proceeding was transferred to the appellate division, the issue of fact shall be tried by a referee or at a trial term of the supreme court and the verdict, report or

decision rendered after the trial shall be returned to, and the order thereon made by, the appellate division. (emphases supplied)

ZONING LAW
TOWN OF NISKAYUNA, NEW YORK

Zoning Board of Appeals
Town of Niskayuna
Schenectady County, New York

GENERAL GOVERNING RULES

8.6.3 CERTIFICATION OF DECISION. A certified copy of the board's decision including all terms and conditions shall be transmitted to the municipal administrative official and shall be binding upon and observed by him and he shall fully incorporate such terms and conditions of the same in the permit to the applicant or appellant whenever a permit is authorized by the board.

Section 11.5 FURTHER RECOURSE

Any person, or persons, jointly or severally aggrieved by any decision of the Zoning Board of Appeals, or by

any officer, department, board of bureau of the town, may apply to the Supreme Court for review by a proceeding under Article 78 of the Civil Practice Law and Rules and as provided in Section 267 of Town Law.

Such proceeding shall be instituted within thirty (30) calendar days after the filing of a decision in the office of the Town Clerk.

IN THE

APPELLATE DIVISION

OF THE STATE OF NEW YORK

IN AND FOR THE

THIRD JUDICIAL DEPARTMENT

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

John P. MacArthur
Attorney for Appellant
284 State Street
Albany, New York 12210
(518) 465-4784

IN THE

APPELLATE DIVISION

OF THE STATE OF NEW YORK

IN AND FOR THE

THIRD JUDICIAL DEPARTMENT

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Marilyn L. Cowger, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Division, Third Judicial Department,

of the State of New York, entered in this action on the 28th day of April, 1982 and affirming the judgment of the Supreme Court of the State of New York in Schenectady County entered December 9, 1980.

This appeal is taken pursuant to U.S.C. § 1257(2).

John P. MacArthur
Attorney for Appellant
284 State Street
Albany, New York 12210
(518) 465-4784

IN THE

APPELLATE DIVISION

OF THE STATE OF NEW YORK

IN AND FOR THE

THIRD JUDICIAL DEPARTMENT

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 1982, copies of this Notice of Appeal were mailed, postage prepaid to Paul L. Ryan, Esq., on behalf of Charles Mongin, Richard S. Arthur, Harold N. Armstrong, Richard

M. Gershon and Paul S. Marble, constituting the Zoning Board of Appeals of the Town of Niskayuna, New York, The Clerk of the Supreme Court, County of Schenectady and John J. O'Brien, Clerk, New York Supreme Court, Appellate Division, Third Department.

I further certify that all parties required to be served have been served.

John P. MacArthur
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